

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES O'NEAL,

Defendant and Appellant.

D037715

(Super. Ct. No. SCD157143)

APPEAL from an order of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

James O'Neal entered a negotiated guilty plea to possessing cocaine base for sale. (Health & Saf. Code, § 11351.5.) The court suspended imposition of sentence and placed him on three years' probation. It included gang conditions among the conditions of probation.¹ O'Neal contends the court erred by including the gang conditions among the probation conditions.

¹ The gang conditions include: (a) Not appear in court or at the courthouse unless you are a party or witness in the proceedings. [¶] (b) Not associate with any known gang

FACTS

On December 19, 2000, police were looking for possible gang activity in the 900 block of Elwood Street. They saw a car in which O'Neal was a passenger pull up at a residence and honk. A female came out of a residence and went to the vehicle. The car then left. Police followed and stopped the car for a traffic violation. They recognized O'Neal as a documented gang member. He appeared to be under the influence of a controlled substance. Officers found a vial of PCP and rock cocaine in O'Neal's socks.

DISCUSSION

In the trial court, O'Neal argued the gang conditions had no nexus to the crime and the information that he had been involved with a gang was stale. On appeal, he specifically argues that each of the conditions listed under "Gang Conditions" in the probation order is improper. The people argue that objection to a probation condition is waived if not made at the sentencing hearing. (See *People v. Welch* (1993) 5 Cal.4th 228, 235.)

member or persons who are associated with the O'Farrell gang. [¶] (c) Not visit or frequent any school grounds unless you are a student registered at the school. [¶] (d) Not knowingly be an occupant in a stolen vehicle. [¶] (e) Not own, transport, sell, possess any weapon, firearm, replica, ammunition, or any instrument used as a weapon. [¶] (f) Not associate with any persons who have firearms or weapons in their possession. [¶] (g) Not participate in activities/frequent places where firearms or weapons are used illegally or legally (hunting/target shooting). [¶] (h) Not be in possession of any beeper or paging device except in the course of lawful employment. [¶] (i) Not be within two blocks of 900 Elwood Street (an area of gang or criminal activity). [¶] (j) Not wear, display, use or possess any insignias, emblems, badges, buttons, caps, hats, jackets, shoes, flags, scarves, bandanas, shirts, or other articles of clothing which are evidence of affiliation with or membership in the O'Farrell gang. [¶] (k) Not display any gang signs or gestures.

The People are correct. O'Neal waived his right to claim on appeal the specific conditions infringe upon his constitutional rights. Even if we were to reach the merits, we would affirm.

"Probation is an act of leniency, not a matter of right." (*People v. Walmsley* (1985) 168 Cal.App.3d 636, 638.) A trial court has broad discretion to grant probation and to determine its conditions. (*People v. Lafantasie* (1986) 178 Cal.App.3d 758, 761.) The exercise of discretion must be neither arbitrary nor capricious, must be impartial, and must be guided and controlled by fixed legal principles. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) A condition of probation is valid if it: (1) has a relationship to the crime of which the defendant was convicted; (2) relates to conduct which is itself criminal; or (3) requires or forbids conduct that is reasonably related to future criminality. (*People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.)

The court here imposed 11 probation gang conditions. Given the fact that O'Neal is a documented gang member² and his criminal behavior here, the court reasonably determined that the imposition of gang conditions would help disassociate O'Neal from gang-related activities and "insulate him from a source of temptation to continue to

² O'Neal argues that the conditions which bar him from using a beeper or associating with gang members and frequenting particular locations do not relate to the crime and infringe on his constitutional rights to freedom of association and movement. At the outset, we note that a probation condition can be proper if it relates to the crime or the defendant. We reject O'Neal's claim that the record here does not reflect that he is involved in gang activity. The probation report states that the arresting officers determined O'Neal, "to be a documented gang member." At the sentencing hearing, defense counsel told the court that she did not believe this information to be current. Whether defense counsel believed the information on O'Neal's gang activity to be current is not decisive because the record supports the trial court's implied finding that he was currently involved in gang activity.

pursue a criminal lifestyle." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 626.)

Conditions (d) through (g) are reasonably related to the prevention of future criminality given O'Neal's gang membership. It is reasonable for a court to deter future criminality by imposing additional conditions that prohibit an admitted gang member, who is convicted of possessing drugs, from knowingly occupying a stolen vehicle; owning, transporting, selling or possessing a firearm or deadly weapon; associating with persons who possess firearms or deadly weapons; and participating in activities or frequenting places where firearms or other weapons are used whether legally or illegally.

Conditions (b), (i), (j) and (k) prohibit association with known gang members or those who associate with the O'Farrell gang, frequent particular locations and also preclude wearing, using or possessing any indicia of the O'Farrell gang or displaying any gang signs or gestures. These conditions insure that O'Neal will "not be present at confrontational situations between rival gangs; hostility among different gangs is often an underlying cause of criminal activity [and will remove] from [O'Neal] the visible reminders of his past gang connection." (*People v. Lopez, supra*, 66 Cal.App.4th at p. 626.) We conclude the inclusion of these gang based probationary conditions was not an abuse of discretion. "Instead, under the circumstances, it promoted . . . goals of rehabilitation and public safety by forbidding conduct reasonably related to future criminality." (*Ibid.*, citing *People v. Lent* (1975) 15 Cal.3d.481, 486.) We recognize three conditions imposed by the court are open to question. Gang condition (a) states O'Neal must not "appear in court or at the courthouse unless [he is] a party or witness in the proceedings;" condition (c) states O'Neal must not "visit or frequent any school

grounds unless [he is] a student registered at the school;" and condition (h) forbids O'Neal's "possession of any beeper or paging device except in the course of lawful employment." Conditions (a) and (c) are open to question as unnecessary given the validity of the other conditions. If the concern is that O'Neal would constitute a gang presence at a court or school, the conditions forbidding association with gang members, wearing gang clothing, or displaying gang insignias or signs are sufficient. Finally, we found a gang injunction provision regarding pagers similar to condition (h) to be overbroad in *In re Englebrecht* (1998) 67 Cal.App.4th 486. We need not reach O'Neal's challenges to these three conditions because, while he objected generally to imposition of gang conditions, no specific objection was leveled at these three and neither the People nor the court were called on to marshal evidence or argument concerning their validity. O'Neal's objection made for the first time on appeal comes too late. (*People v. Welch*, *supra*, 5 Cal.4th at p. 230.) While on this record we affirm imposition of these conditions as well, we do so without prejudice to a motion by O'Neal to modify or strike them.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.